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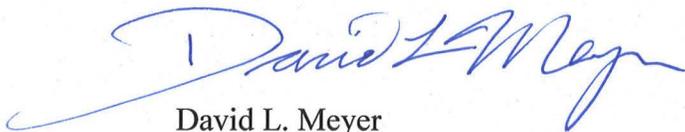
Re: STB Docket NOR 42134, National Railroad Passenger Corporation – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company

Dear Ms. Brown:

Attached for electronic filing in the above-referenced docket is Norfolk Southern Railway Company's Petition to Intervene in the above captioned proceeding.

Thank you for your assistance.

Sincerely,



David L. Meyer

Attachment

cc (with attachment):

Greg E. Summy, Esq.
Garrett D. Urban, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 42134

**NATIONAL RAILROAD PASSENGER CORP. –
SECTION 213 INVESTIGATION OF SUBSTANDARD
PERFORMANCE ON RAIL LINES OF CANADIAN
NATIONAL RAILWAY COMPANY**

NORFOLK SOUTHERN'S PETITION TO INTERVENE

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Dated: January 12, 2015

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SURFACE TRANSPORTATION BOARD**

DOCKET NO. 42134

**NATIONAL RAILROAD PASSENGER CORP. –
SECTION 213 INVESTIGATION OF SUBSTANDARD
PERFORMANCE ON RAIL LINES OF CANADIAN
NATIONAL RAILWAY COMPANY**

NORFOLK SOUTHERN’S PETITION TO INTERVENE

Pursuant to 49 C.F.R. § 1112.4, Norfolk Southern Railway Company (“Norfolk Southern”) submits this Petition to Intervene in the above captioned proceeding so that it may participate in the process by which the Board intends to “construe the term ‘on-time performance’” as used in PRIIA Section 213, 49 U.S.C. § 24308(f). *Nat’l R.R.*

Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat’l Ry. Co. (“Amtrak/CN”), Docket No. 42134 (served Dec. 19, 2014) (“December 19 Decision”). Norfolk Southern does not intend to participate with respect to the question of whether 80 percent “on-time performance” is met on the facts of the case, or as to the substance of Amtrak’s complaint.

In its December 19 Decision, the Board ruled that it may “independently set forth and implement a definition” of on-time performance under PRIIA Section 213 “for purposes of this proceeding,” and ordered the parties to submit opening arguments on how to define “on-time performance” by January 20, 2015, with replies due by February 2, 2015. *See* December 19 Decision at 9, 11. The Board declined Vice-Chairman (then-Commissioner) Begeman’s suggestion that it address the definition of “on-time

performance” in a rulemaking affording all interested stakeholders an opportunity to offer comment. *Id.* at 12.

For reasons discussed below, Norfolk Southern should be permitted to intervene as to the limited issue of the definition of “on-time performance.” Further, Norfolk Southern agrees with Vice Chairman Begeman that a rulemaking process would be the appropriate course to consider on this issue. If the Board were to reconsider its procedural approach and commence a rulemaking outside the *Amtrak/CN* proceeding, Norfolk Southern would no longer have any desire to participate in this case.

I. NORFOLK SOUTHERN’S PETITION TO INTERVENE SHOULD BE GRANTED

The Board may grant a petition to intervene if intervention will not unduly disrupt the schedule for filing verified statements; and would not unduly broaden the issues raised in the proceeding. 49 C.F.R. § 1112.4(a) (2013); *see also V&S Railway, LLC – Petition for Declaratory Order—Railroad Operations in Hutchinson, Kan.*, Docket No. 35459 (served Feb. 17, 2011) at 2. Norfolk Southern’s Petition to Intervene comports with these standards: (1) Norfolk Southern has a legitimate interest in the matters to be addressed in this proceeding; (2) its participation would not “broaden the issues,” and (3) its participation would not “disrupt the schedule.”

Norfolk Southern Has a Legitimate Interest.

As the Board is aware, Norfolk Southern is a party to a complaint filed by Amtrak under PRIIA Section 213 alleging substandard performance of Amtrak’s Capitol Limited service. *See Complaint, Nat’l R.R. Passenger Corp. – Investigation of Substandard Performance of the Capitol Limited*, Docket No. 42141 (filed as corrected Nov. 19, 2014) (“*Amtrak/Capitol Limited*”). In its supporting Memorandum of Law, Amtrak requested

that the Board undertake an investigation under PRIIA Section 213 predicated on the Capitol Limited's alleged poor "on-time performance," and urged the Board to develop and apply some definition of "on-time performance" that would trigger such an investigation. Mem. of Law, *Amtrak/Capitol Limited*, at 2-3. Consequently, Norfolk Southern has an interest in whatever definition of "on-time performance" the Board may arrive at in *Amtrak/CN*. This case appears to be the vehicle by which the Board will consider the issue for the first time, and it seems likely to set important regulatory precedent. *See Gov't of the Territory of Guam v. Sea-Land Service, Inc.*, Docket No. WCC-101 (served Nov. 15, 2001) ("*Guam*") (granting intervention by Caribbean Shippers Association to address "matters of general regulatory policy" that may affect rights of its members in future rate reasonableness cases).

As in *Guam*, Norfolk Southern has a keen interest in the "general regulatory polic[ies]" the Board appears to have in mind developing in the *Amtrak/CN* case. By setting – or at least *affecting* – the bar Amtrak must clear to commence a Section 213 investigation, the definition of "on-time performance" established by the Board could have a significant bearing on Norfolk Southern's litigation with Amtrak. *See* December 19 Decision at 11-12 (Begeman, C., dissenting) ("[E]stablish[ing] a Section 213 standard that will most assuredly be used in all other current and future cases, and have a far-reaching impact on the entire industry.").

Norfolk Southern's Participation Will Not Broaden the Issues

Norfolk Southern's participation for the limited purpose of addressing the definition of "on-time performance" will not broaden the issues under consideration in this case. Indeed, the only reason Norfolk Southern seeks intervention is to address the very issue the Board has decided to consider at the threshold of this proceeding. *See*

Canexus Chemicals Canada L.P. v. BNSF Railway Company—Emergency Service Order, Docket No. 35524 *et. al.* (served Oct. 14, 2011) (granting request to intervene: “CP’s comments are in direct response to issues already raised by the parties in this case. Thus, CP’s participation will not unduly broaden the issues presented.”).

Norfolk Southern’s Participation Will Not Disrupt the Schedule.

Norfolk Southern believes it would be appropriate for the Board to allow more time for interested parties to develop and present their views on the definition of “on-time performance.” The Board could (and Norfolk Southern believes should) accomplish this by establishing a separate, *ex parte* proceeding in which to solicit comment on on-time performance definitions. *See infra* pp. 7-11. If the Board nonetheless proceeds via adjudication in this docket, the Board should revise the schedule for submission of opening and reply briefs, perhaps by 20-30 days, to allow interested parties to develop and communicate their perspectives.

That step would not, however, be necessitated by Norfolk Southern’s intervention, but by principles of basic fairness and the Board’s interest in developing a fully-informed record. If the Board does not adjust the schedule, Norfolk Southern would endeavor to submit its views by the current deadlines for opening and reply briefs herein. As such, Norfolk Southern’s intervention will not delay this proceeding.

II. A NOTICE-AND-COMMENT RULEMAKING IS APPROPRIATE TO ADDRESS THE BOARD’S DEVELOPMENT OF ON-TIME PERFORMANCE METRICS

As noted above, Norfolk Southern believes that a notice-and-comment rulemaking is the only appropriate process by which the Board could exercise whatever authority it might have (and Norfolk Southern respectfully believes it has none) to define “on-time performance” for purposes of making the threshold determination of whether an

investigation may commence under PRIIA Section 213.¹ Norfolk Southern would no longer seek intervention in this case if the Board undertook such a process in place of adjudicating the issue.

A notice-and-comment rulemaking is the appropriate course for at least three reasons: (1) it is the only fair way to give all host railroads and other stakeholders an opportunity to participate in the development of the standards that will trigger Section 213 investigations; (2) it is how the Board has typically addressed threshold issues of statutory interpretation that will apply in an array of future regulatory disputes; and (3) it is the most efficient way for the Board to resolve the specific issue here for pending and future cases.

A. A Notice-And-Comment Rulemaking Is the Only Process that Would Afford All Interested Stakeholders a Meaningful Opportunity to Participate

There is a broad and diverse group of stakeholders interested in the definition of “on-time performance,” as evidenced by the wide participation in the FRA/Amtrak metrics and standards-development process. Those parties include not only Amtrak and its many host railroads, but numerous others with an interest in passenger trains and the freight-carrying capacity they consume.² Moreover, the definition the Board chooses will

¹ That position is shared by every defendant to a pending Amtrak complaint. See CSXT’s Response to the Nat’l R.R. Passenger Corp.’s Complaint, *Nat’l R.R. Passenger Corp. – Investigation of Substandard Performance of the Capitol Limited*, Docket No. 42141 (filed Jan. 7, 2015) at 6; CN’s Petition for Reconsideration of the Board’s Order of December 19, 2014, *Nat’l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of CN*, Docket No. 42134 (filed Jan. 7, 2015) at 8.

² During the development of the PRIIA Section 207 Metrics and Standards, stakeholders such as State Departments of Transportation, State and regional passenger railroad agencies, railroad-related associations and one labor organization submitted comments. See FRA & Amtrak, *Metrics and Standards for Intercity Passenger Rail Service Under Section 207 of the Passenger Rail Investment and Improvement Act of 2008*, 75 Fed. Reg. 26,839 (May 11, 2009);

affect all users of the national rail system through its potential impacts on scheduling and service performance.

These concepts and issues cannot be addressed adequately by just two parties in the context of a single adjudication. The comments before FRA on the proposed metrics reveal extensive debate and controversy regarding the definition of on-time performance. *See, e.g. Metrics and Standards* at 11-22 (“The largest number of comments on the Proposed Metrics and Standards concerned the measures for on-time performance and train delays.”).³ A notice-and-comment rulemaking is the only realistically feasible way to enable all affected parties and interested stakeholders to participate and express their views on the proposals for the definition of “on-time performance.”

B. The Board Has Undertaken Notice-And-Comment Rulemaking in Analogous Situations

Second, a notice-and-comment process here would be consistent with the Board’s past practice. To be sure, the Board routinely interprets and applies statutes in the course of its regulatory responsibilities. But when it has considered issues of first impression or great controversy that will affect the behavior and rights of numerous parties potentially within the Board’s regulatory jurisdiction, the Board has consistently done so in proceedings open to broad public participation affording a meaningful opportunity to comment on the proposals put forward by the Board and others. Among the many such examples are: *Demurrage Liability*, Ex Parte No. 707 (served May 7, 2012) (addressing

FRA, *Metrics and Standards for Intercity Rail Passenger Service* (May 12, 2010), Docket No. FRA-2009-0016, at 3, available at <http://www.fra.dot.gov/Elib/Details/L02875>.

³ See also, e.g., Kevin M. Sheys, “Amtrak’s Metrics-Making Power Hangs in the Balance,” NOSSAMAN LLP ALERT (July 28, 2014) (“Host railroads took issue with many aspects of the draft metrics and especially those formulated to measure on-time performance.”), available at <http://www.nossaman.com/AmtraksMetricsMakingPowerHangsInTheBalance>.

standards for determining who may be held responsible for paying demurrage charges); *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, Ex Parte No. 669 (served Mar. 29, 2007) (addressing definition of statutory term relevant to scope of Board's rate regulatory jurisdiction); *Major Issues in Rail Rate Cases*, Ex Parte No. 657 (Sub-No. 1) (served Oct. 30, 2006) (addressing important issues in stand-alone cost cases); *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1) (served June 11, 2001) (adopting new regulations governing procedures for major rail merger proposals); *Market Dominance Determinations—Product and Geographic Competition*, Ex Parte No. 627 (served Dec. 21, 1998) (addressing the role of evidence concerning product and geographic competition in market-dominance determinations in rate reasonableness cases); *Central Power & Light Co. v. Southern Pacific Transportation Co.*, 1 S.T.B. 1059, 1062-63 (1996) (addressing, in cases consolidated for purposes of soliciting broad public comment, extent of a carrier's obligation to quote rates over so-called "bottleneck" segments).

The examples are legion and varied. Some addressed topics that – like the "triggering" role of "on-time performance" in Section 213 – determine when and how a potential complainant will be entitled to seek redress at the Board. *E.g.*, Ex Parte No. 669 (rates established in "contracts" as defined by the Board may not be challenged); Ex Parte No. 627 (limiting scope of substantive issues the Board will consider when making threshold market-dominance determinations); Ex Parte No. 657 (Sub-No. 1) (addressing availability of movement-specific adjustments to URCS for purposes of statutory 180 R/VC market-dominance threshold).

Others addressed the proper interpretation to be given an operative term or phrase in a governing statute – akin to the Board’s need to define “on-time performance” in Section 213. *E.g.*, Ex Parte No. 669 (construing the term “contract” as used in 49 U.S.C. §10709 to resolve “the lack of any clear demarcation between contract and common carrier rates because of the boundaries on our jurisdiction”); Ex Parte No. 707 (construing 49 U.S.C. § 10743).

But the common denominator typically is – as here – a set of “common issues of industry-wide significance for rail carriers and shippers [or other stakeholders]”⁴ that would have important bearing on the future regulatory implications of the parties’ conduct.

C. Notice and Comment Rulemaking Provides the Most Efficient Method of Addressing this Issue for Pending and Future Cases

Finally, the definition of “on-time performance” is already expressly at issue in two cases (involving three host railroads) pending before the Board. The standard for triggering a Section 213 investigation will likewise be a necessary element in any future proceeding filed by Amtrak or other interested parties alleging substandard performance of passenger service. If the Board proceeds within the context of the *Amtrak/CN* proceeding, the Board will be forced to reconsider this issue repeatedly, because any holding in the *Amtrak/CN* proceeding will not bind subsequent parties. A rulemaking proceeding, in contrast, will establish principles of general application for future disputes, minimizing the time and resources that the parties (and the Board) must expend in those cases.

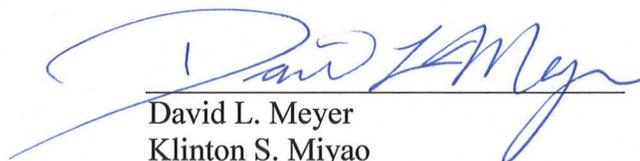
⁴ *Central Power & Light*, 1 S.T.B. at 1062-63.

CONCLUSION

Norfolk Southern respectfully requests that the Board grant its Petition to Intervene so that it may participate in the Board's development of a definition for on-time performance metrics in the *Amtrak/CN* proceeding, unless the Board instead commences a rulemaking as suggested by Vice Chairman Begeman.

Respectfully submitted,

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Dated: January 12, 2015

CERTIFICATE OF SERVICE

I, Aaron D. Rauh, certify that on this date a copy of Norfolk Southern's Petition to Intervene, filed on January 12, 2015, was served by email and by first-class mail, postage prepaid, on all parties of record, as follows:

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